Office - Supreme Court
FILED
DEC 3 1981
ALEXANDER

No. 80-2147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT *et al.*,
Petitioners,

v.

WINNIE TEAL *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION IN SUPPORT OF THE PETITIONERS

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
EDWARD E. POTTER
McGUINESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	5
ARGUMENT	7
THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE PURPOSES OF TITLE VII, PRIOR PRECEDENT OF THIS COURT, AND WITH THE BOTTOM LINE APPROACH WHICH THIS AND OTHER COURTS AND THE FEDERAL ENFORCEMENT AGENCIES HAVE ADOPTED IN DISPARATE IMPACT CASES....	7
A. A Prima Facie Case of Disparate Impact Under Title VII Cannot be Established By the Results of a Component of a Selection Process If There is No Adverse Impact in the Number of Minorities Hired or Promoted	7
B. The Second Circuit's Decision is Not in Conformance With the Bottom Line Approach Which the Federal Enforcement Agencies Have Adopted to Determine Liability Under Title VII	11
C. The Second Circuit's Decision Misapplies the the Bottom Line Test by Inappropriately Making Distinctions Between Successive Hurdle and Cumulatively Scored Selection Processes and Fails to Recognize the Adverse Consequences of its Decision on Judicial Economy and Efficiency	16
D. The Second Circuit's Decision Conflicts With the Principles Enunciated By This Court in *Furnco*	21

TABLE OF CONTENTS—Continued

Page

E. Title VII and Decisions of This Court Permit Employers to Make Adjustments to Compensate for the Adverse Effects of Components of Selection Processes 24

CONCLUSION 29

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 6, 10, 21, 25, 26
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 6, 26
Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm., 354 F. Supp. 778 (D. Conn.), *aff'd in part*, 482 F.2d 1333 (2d Cir. 1973) 20
Brown v. New Haven Civil Service Bd., 474 F. Supp. 1256 (D. Conn. 1979) 5, 6, 17, 18
City of Los Angeles v. Manhart, 435 U.S. 702 (1978) 5, 20
Dothard v. Rawlinson, 433 U.S. 321 (1977) 6, 7, 9, 10, 16, 18, 21
East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395 (1977) 2
EEOC v. Greyhound Lines, 635 F.2d 188 (3d Cir. 1980) 16
EEOC v. Navajo Refining Co., 593 F.2d 988 (10th Cir. 1979) 17
Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977) 19
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 8
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 2, 6, 17, 21, 22, 23, 24, 25
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 5, 8, 9, 10, 11, 20, 25, 26
Hazelwood School District v. United States, 433 U.S. 299 (1977) 9, 14
Int'l. Bro. of Teamsters v. United States, 431 U.S. 324 (1977) 2, 6, 8, 9, 24, 25, 26
Kirkland v. N.Y. State Dept. of Correctional Services, 374 F. Supp. 1361 (S.D. N.Y. 1974), *aff'd in relevant part*, 520 F.2d 420 (2d Cir. 1975) 17
League of United Latin American Citizens v. City of Santa Ana, 410 F. Supp. 873 (C.D. Calif. 1976) 17, 18

TABLE OF AUTHORITIES—Continued

Page

Lee v. City of Richmond, 456 F. Supp. 756 (E.D. Va. 1978) 17
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 9
New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 9
Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978) 28
Rule v. Ironworkers Local 396, 568 F.2d 558 (8th Cir. 1977) 17
Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976) 17, 18, 19
Stewart v. Hannon, 469 F. Supp. 1142 (N.D. Ill. 1979) 17, 23
Texas Department of Community Affairs v. Burdine, 101 Sup. Ct. 1089 (1981) 2, 7, 23, 26, 28
United Air Lines v. Evans, 431 U.S. 553 (1977) 14
United States v. City of Buffalo, 457 F. Supp. 612 (W.D.N.Y. 1978) 18
United Steelworkers v. Weber, 99 Sup. Ct. 2721 (1979) 8, 25, 26, 27, 28
Vulcan Society of New York City Fire Department v. Civil Service Commission, 360 F. Supp. 1265 (S.D. N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973) .. 17
Washington v. Davis, 426 U.S. 229 (1976) 7
Williams v. City & County of San Francisco, 483 F. Supp. 335 (N.D. Calif. 1979) 17

Statutes:

Administrative Procedures Act, 5 U.S.C. § 553 14
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ..... *passim*
42 U.S.C. § 1983 9
Conn. Stat. § 46a-68 27

Legislative History:

Hearings on S. 2115, etc., Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess. (1971) 27

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971)	7
S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971)	7
110 Cong. Rec. 6548 (1963)	7
Regulations:	
Executive Order 11246, 30 Fed. Reg. 12319 (1965), *as amended by* 32 Fed. Reg. 14302 (1967) and 43 Fed. Reg. 46501 (1978)	27
Affirmative Action Guidelines, 29 C.F.R. §§ 1608 *et seq.*	6, 27
Federal Executive Agency Guidelines on Employee Selection Procedures, 41 C.F.R. Part 60-3 (1977)	11
Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607 *et seq.* (1977)	11
Questions and Answers Clarifying the Uniform Guidelines, 43 Fed. Reg. 11996 (March 2, 1979)	13, 14, 15
Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607 *et seq.* (1979)	3, 5, 6, 11, 12, 13, 26
Section 3A	26
Section 4C	6, 12, 13, 14, 16
Section 6	26
Section 16	14
Miscellaneous:	
Feinberg, *The Analysis of Cross-Classified Categorical Data* (1977)	20
Maxwell, *Analyzing Qualitative Data* (1977)	20
Miller, *Simultaneous Statistical Inference* (1977)	20
Nash, "Affirmative Action Under Executive Order 11246," 46 N.Y. U. L. Rev. 225 (1971)	27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2147

STATE OF CONNECTICUT *et al.*,
Petitioners,

v.

WINNIE TEAL *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC) and the International Personnel Management Association (IPMA), with the written consent of the parties,[1] respectfully submit this brief as Amici Curiae in support of the Petitioners.

INTEREST OF THE AMICI CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad

---

[1] Their consents have been filed with the Clerk of the Court.

segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially, all of EEAC's members, or their constituents are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, *as amended by* the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e (Title VII). Like the Petitioners herein, EEAC's members use tests and other selection devices and criteria to hire and promote employees. As such, they have a direct interest in the issue presented for the Court's consideration; that is, whether a prima facie case of discrimination can be established by the adverse impact of a facially neutral component of a selection process when the overall hiring or promotion rate of the plaintiff's class does not demonstrate adverse impact against that class.[2]

IPMA is an organization representing more than 1,000 public sector agencies including civil service commissions, merit system boards and personnel departments at the federal, state and local levels of government. The Association represents over 55,000 individuals, primarily personnel professionals and personnel administrators in the public sector. IPMA attempts to foster and develop in-

---

[2] Because of this interest in issues involving the standard of proof in Title VII cases, EEAC has filed briefs amicus curiae in this Court in *Intl. Bro. of Teamsters v. United States*, 431 U.S. 324 (1977); *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); and *Texas Department of Community Affairs v. Burdine*, 101 Sup. Ct. 1089 (1981).

terest in sound personnel administration by providing a focus and forum for personnel professionals throughout the United States and abroad.

IPMA recognizes its special responsibility to promote and encourage affirmative action programs and to ensure that the organization itself becomes a model of equal opportunity throughout the nation both by policy and preference. The Association is committed to equal employment opportunity and continues to promote and encourage equal opportunity at all levels of government and within its Association activities. IPMA was involved in the negotiation process which resulted in the promulgation of the Uniform Guidelines on Employee Selection Procedures and the Association strongly endorsed throughout the negotiations, the inclusion of the "bottom line" concept as a mechanism which would assist employers in achieving affirmative action.

In meeting the equal employment mandate of Title VII, both private and public sector employers utilize a variety of facially neutral selection procedures including application forms, biodata, tests, performance appraisals, and assessment centers, and minimum selection criteria such as specific educational requirements. These procedures may be used separately, as the sole selection procedure, or in combination. Depending on such factors as the employer's economic resources and the size of the qualified labor pool it needs to select from, all candidates may participate through the entire selection process or certain components may serve as legitimate hurdles that identify those qualified candidates who may continue to participate in the selection process. The decision of the Second Circuit, holding that a prima facie case of discrimination may be established by the results of a component of a selection procedure which screens employees from further participation in the selection process, places employers in the position of facing potential liability to minority employees even though the overall selection process does not result in disparate impact.

STATEMENT OF THE CASE

Petitioners utilized a multi-component, merit selection process to assess the qualifications of candidates for promotion to supervisor positions in the Department of Income Maintenance. Candidates for these positions were first required to take a professionally-developed, validated test. Those employees receiving a passing score were then evaluated on the basis of past work performance, supervisors' recommendations, and seniority in conjunction with their test scores. At the third stage of the process, the Petitioners made their selections among the remaining qualified candidates.

In December 1978, the test was administered to 329 candidates for 46 vacancies. The mean score on the examination was 70.4 percent, but black candidates had a mean score that was 6.7 percentage points lower than white candidates. Because a cutoff score of 70 would have substantially limited the number of qualified blacks proceeding to the next step of the selection process, the Petitioners lowered the cutoff score to 65. Although the lower cutoff score permitted more blacks to participate in the remainder of the selection process, the percentage of blacks who continued was 54.2% compared to 79.53% of the initial white candidates. Of the 329 candidates who took the test, 246, or 74.8% of all candidates, were rated and ranked by the remaining components of the selection process. But when the selection decisions or promotions were made after application of the other components of the selection process, there was no adverse impact against blacks. Indeed, blacks were substantially favored by the Petitioners' selection process—23 percent of the blacks who initially entered the selection process were promoted, compared to 13.5% of the initial white candidates.

A suit under Title VII and other statutes was brought by four black applicants who scored less than 65 percent on the examination prior to any selection decisions being

made by the Petitioners, alleging, *inter alia*, that the test component had an adverse impact on blacks. One year after the suit was initiated, the promotion decisions were made. Relying principally on the reasoning of *Brown v. New Haven Civil Service Bd.*, 474 F. Supp. 1256 (D. Conn. 1979)—a case factually similar to the instant matter—the district court adopted the bottom line approach of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607 *et seq.* (Uniform Guidelines), and dismissed the Respondents' suit because the results of the promotion process did not have adverse impact against blacks.

The Second Circuit reversed. It held that where a component of a selection process has a disparate impact on minorities and constitutes a barrier beyond which complainant minorities cannot proceed, a prima facie case of discrimination is established even though the process taken as a whole does not result in disparate impact. Distinguishing the situation where all candidates participate in the entire selection process and the overall results have no adverse impact on minorities, the court of appeals disagreed with the district court's holding in *New Haven Civil Service Bd.*

SUMMARY OF ARGUMENT

Congress did not intend in enacting Title VII that courts should examine the components of a facially neutral selection process, or collaterally that complainants could establish prima facie cases of discrimination based on the results of one segment of a selection procedure, if the final hiring and promotion decisions do not evidence adverse impact. Indeed, this Court has recognized that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* [*v. Duke Power Co.*, 401 U.S. 424 (1971)] does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *City of Los Angeles v. Manhart*, 435 U.S. 702, 710 n.20 (1978) (emphasis in original). Absent evidence of dis-

criminatory intent, this Court and the federal enforcement agencies have looked at the "bottom line", *i.e.*, the overall results of the selection process to assess whether plaintiffs have established prima facie cases of discrimination. *See Dothard v. Rawlinson*, 433 U.S. 421 (1977); *Intl. Bro. of Teamsters v. United States*, 431 U.S. 324 (1977); and Uniform Guidelines, 29 C.F.R. § 1607.4C.

The Second Circuit's decision misapplies the bottom line standard, in part, because of its failure to recognize that the pattern of proof in disparate impact cases is addressed to the evidence of the adverse consequences that a facially neutral practice has on the plaintiff's group rather than the plaintiff directly, as under a disparate treatment theory of discrimination, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Moreover, in adopting a standard that requires greater judicial scrutiny of a selection process that does not permit all qualified candidates to participate in all steps of the process than a process that does, the lower court violated the Court's admonition in *Furnco Construction Co. v. Waters*, 438 U.S. 567, 578 (1978), that employers are not required to adopt a "best" hiring procedure that would permit it "to at least consider . . . the most minority employees." Furthermore, application of the Second Circuit's standard of proof would have deleterious effects on judicial economy and efficiency, because examination of each component or sub-component of a selection process that has adverse impact "launches a court on a course that has no boundaries and no clear end." *New Haven Civil Service Bd.*, 474 F. Supp. at 1261.

This Court and the federal enforcement agencies have stressed that voluntary compliance is the "preferred means" of eliminating employment discrimination. *Alexander Gardner-Denver*, 415 U.S. 36, 44 (1974); Affirmative Action Guidelines, 29 C.F.R. § 1608.4. Thus, once the Petitioners had established an eligibility pool of qualified candidates, it was not impermissible under Title VII for the Petitioners to assure that among those se-

lected there was adequate representation of black supervisors in its workforce because "the employer has discretion to choose among equally qualified candidates." *Texas Department of Community Affairs v. Burdine*, 101 Sup. Ct. 1089, 1097 (1981).

ARGUMENT

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE PURPOSES OF TITLE VII, PRIOR PRECEDENT OF THIS COURT, AND WITH THE BOTTOM LINE APPROACH WHICH THIS AND OTHER COURTS AND THE FEDERAL ENFORCEMENT AGENCIES HAVE ADOPTED IN DISPARATE IMPACT CASES.

A. A Prima Facie Case of Disparate Impact Under Title VII Cannot be Established By The Results of a Component of a Selection Process If There is No Adverse Impact in the Number of Minorities Hired or Promoted.

In enacting Title VII, Congress sought to improve the employment opportunities of minorities and women by assuring that selection decisions were made in a nondiscriminatory manner.[3] "Accordingly, it was clear to Congress that 'the crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them.' [110 Cong. Rec.] at 6548 (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against

[3] When Congress amended Title VII in 1972 extending its nondiscriminatory requirements to state and local jurisdictions, "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard v. Rawlinson*, 433 U.S. 321, 331, n. 14 (1977). *See* H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 17 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971). *See also Washington v. Davis*, 426 U.S. 229 (1976). Accordingly, this brief treats the equal employment requirements of Title VII as being identical for the public and private sector.

racial discrimination in employment was primarily addressed." *United Steelworkers v. Weber*, 99 Sup. Ct. 2721, 2728 (1979). The focus of Title VII, therefore, is on whether an employer's practices result in hiring, promotion, or other employment discrimination against minorities and women.

As demonstrated below, the Congressional concern was with the overall result of the hiring or promotion process. Congress did not intend that courts examine the components of facially neutral selection processes, or collaterally that complainants could establish prima facie cases of discrimination based on the results of one segment of a process, if the final hiring and selection decisions do not evidence adverse impact. All that has been "required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In this case, the results of the Petitioners' neutral selection process confirm that its selection process does not act as a discriminatory barrier to minority candidates as a group. Indeed, this is *not* a case which "racial discrimination was the [employer's] standard operating procedure—the regular rather than the unusual practice." *Intl. Bro. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). *See also Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772 (1976).

Moreover, although Title VII does not require employers to hire or promote minorities and women in proportion to their representation in the population (see 42 U.S.C. § 2000e-2(j)), this Court has held that the ordinary expectation is that "nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population of the community from which employees

are hired." *Teamsters*, 431 U.S. at 340 n. 20.[4] By the same reasoning, where the employer's overall promotion procedure results in a minority promotion rate that is greater than would be expected by their labor force representation, or representation in the relevant labor pool, the lack of discrimination should be presumed.

In implementing the nondiscrimination requirements of Title VII, this Court has adopted two patterns of proof of discrimination—disparate treatment and disparate impact. *Teamsters*, 431 U.S. at 335 n. 15. Under these practical proof schemes, the focus of the Court's inquiry has been on the reasons for nonselection in a disparate treatment case (*see McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973)) and on the consequences of the total selection process in a disparate impact case (*see Griggs*, 401 U.S. at 432 (1971), and *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977)).[5] Under the disparate impact standard, misapplied by the court below, it is the outcome of the entire selection process that determines whether a prima facie case under Title VII has been established.

This is the first case in which this Court has been asked to find discrimination in a selection process whose

---

[4] *See also Hazelwood School District v. United States*, 433 U.S. 229, 307-08 (1977) ("Where gross disparities can be shown, they alone in a proper case constitute prima facie proof of a pattern and practice of discrimination."); and *New York City Transit Authority v. Beazer*, 440 U.S. 568, 584 n. 25 (Plaintiffs would be hard pressed to present a discriminatory purpose case because the defendant employed minorities at twice their availability in the relevant labor market).

[5] There is no justification in the context of this case for examination of a component of a selection process on the basis of a disparate treatment theory, absent direct evidence that the component was intended to screen out blacks or the Respondents themselves. Indeed, the trial court specifically found that "proof of such intent is absent in this case and plaintiffs' § 1983 equal protection claim accordingly must fail." Pet for Cert. 24a. The overall results of the selection process establish that the Petitioners did not intend to screen out blacks as a class.

overall result favors minorities. The Court's prior decisions have indicated, however, that it is the overall results of the selection process that determine whether a prima facie case under Title VII has been established. Thus, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court stated that the complainant party or class makes out a prima facie case, if it has been "shown that the tests in question *select applicants for hire or promotion* in a racial pattern significantly different from that of the pool of applicants." 422 U.S. at 425 (emphasis added). Again, in *Dothard v. Rawlinson*, 433 U.S. 421 (1977), the Court assessed the results of the overall selection process and stated that, under *Griggs* and *Albemarle*, it was clear that a prima facie case could be established by a plaintiff's showing that facially neutral selection standards "*select applicants for hire* in a significantly discriminatory pattern". 433 U.S. at 329 (emphasis added). Importantly, it was only *after* it had been shown that the multi-component "employment standards" in *Dothard* were discriminatory in overall effect that this Court held the employer was required to meet the burden of showing that a specific selection requirement was job related. *Id.*

In *Dothard*, as in *Griggs* and *Albemarle*, it was evident that the overall selection process had a substantial adverse impact on the plaintiffs' protected group. Nothing in these three decisions suggests that a procedure that ultimately selects minorities or women at a rate equal to or greater than their representation in the eligibility pool may nevertheless be discriminatory. Read together, these cases support a "bottom line" standard, and are consistent with the administrative interpretations of the federal enforcement agencies, discussed below, and represent a practical and workable scheme for establishing prima facie cases of discrimination. By contrast, the Second Circuit's decision is inconsistent with the purposes of Title VII, the precedent of this Court, and the guidance of the federal enforcement agencies. Accordingly, the Second Circuit's decision should be overturned.

B. The Second Circuit's Decision is Not in Conformance With the Bottom Line Approach Which the Federal Enforcement Agencies Have Adopted to Determine Liability Under Title VII.

The bottom line approach to assessing the employment practices of employers has been endorsed by the federal enforcement agencies. In the first federal guidelines on employment testing to follow the Supreme Court's decision in *Griggs*, the Department of Justice, Department of Labor, and the Civil Service Commission, now the Office of Personnel Management, adopted the Federal Executive Agency (FEA) Guidelines on Employee Selection Procedures, 41 C.F.R. Part 60-3 (1977), which in their view were "more consistent with the Supreme Court and the authoritative decisions of the other appellate courts, than any set of existing guidelines." 41 Fed. Reg. 51374 (November 23, 1976). Specifically addressing the underlying question of law, Section 4(b) adopted a bottom line approach to adverse impact determinations:

> (b) The information called for by this section should be examined for possible adverse impact. *If* the records called for by this section indicate that *the total selection process* for a job *has no adverse impact, the individual components of the selection process need not be evaluated separately for adverse impact.* If a total selection process does have adverse impact, the individual components of the selection process should be evaluated for adverse impact.

41 C.F.R. § 60-3.4b (emphasis added). The Equal Employment Opportunity Commission (EEOC) did not join the three other federal agencies in their 1976 guidelines. Rather, EEOC republished its 1970 Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607 *et seq.* (1977), which were focused on test validation and did not address the bottom line issue.

Subsequently, in 1978, the four agencies were able to agree on a uniform federal position on selection practices in the Uniform Guidelines on Employee Selection

Procedures (Uniform Guidelines), 43 Fed. Reg. 38290 (August 25, 1973). Their position reflecting the bottom line, however, obviously represented a substantial compromise between the FEA Guidelines' unequivocal interpretation of Title VII as incorporating a bottom line concept and the position of the EEOC. Indeed, so significant was the disagreement that the preamble to the Uniform Guidelines states that "these guidelines do not address the underlying question of law" with respect to the bottom line standard. 43 Fed. Reg. at 3829. The 1978 guidelines, however, did not explain why the 1976 FEA bottom line approach no longer was valid. Thus, the 1976 FEA Guidelines stand as the enforcement agencies' sole and definitive statement of the underlying question of law.

Notwithstanding the qualifications found in the 1978 Guidelines, as discussed below, Section 4C of the Uniform Guidelines reinforces and supports the bottom line approach of this Court and that of the 1976 FEA Guidelines. Section 4C provides that:

> C. *Evaluation of selection rates. The "bottom line."* If the information called for by sections 4A and B above shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. *If* this information shows that *the total selection process does not have an adverse impact, the Federal enforcement agencies,* in the exercise of their administrative and prosecutorial discretion, *in usual circumstances,* will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and *will not take enforcement action based upon adverse impact of any component of that process including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection.* However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the indi-

> vidual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

29 C.F.R. § 1607.4C. Accordingly, even under its own terms the 1978 Guidelines recognize the validity of the bottom line approach except where *prior* discriminatory practices are perpetuated by the current selection process, or where the weight of court authority holds that a particular procedure is not job related. Neither exception applies to this case or to the usual case involving neutral selection practices. Moreover, as discussed below, even these two limited qualifications to the bottom line approach lack a sufficient legal basis.

That adverse impact and the bottom line are determined under Title VII and the Uniform Guidelines on the basis of selection rates and the total selection process, moreover, is supported by the Guidelines' definitions and several published questions and answers (Q & A) adopted by the enforcement agencies to clarify the meaning of the Guidelines.[6] 43 Fed. Reg. 11996 (March 2, 1979). For

---

[6] The Questions and Answers were issued by the enforcement agencies subsequent to the issuance of the Uniform Guidelines to clarify their meaning. Unlike the Guidelines, they were not subject to public comment before their issuance in accordance with the rulemaking procedures of the Administrative Procedures Act, 5 U.S.C. § 553. Accordingly, while helpful in the context of this case in clarifying the ambiguous language in the Guidelines relating to

example, adverse impact is defined as "a substantially *different rate of selection* in hiring, promotion or other employment decisions." 29 C.F.R. § 1607.16B; Q & A 10, 43 Fed. Reg. at 11998. Similarly, the adverse impact determination is based on the "rate of selection." (Q & A 12, *id.*) which is defined as "[t]he proportion of applicants or candidates who are hired, promoted, or otherwise selected." 29 C.F.R. § 1607.16R.

The two limited exceptions to the bottom-line approach of the Uniform Guidelines found in Section 4C, moreover, should not be viewed by the Court as undercutting the standard. Indeed, logic and precedent of this Court highlight the lack of any valid basis for these narrow exceptions. First, the exception for components that continue a pattern of assignment based on prior discriminatory practices does not relate in any meaningful way to the bottom line effect of current selection procedures. If the effect of current selection procedures is to perpetuate discriminatory assignment patterns, those procedures would undoubtedly have an adverse impact. On the other hand, if the bottom line selection rate shows no adverse impact, the total process itself cannot perpetuate past discrimination. This exception, moreover, is inconsistent with *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977), in which the Court held that actions predating the timely filing of a Title VII charge are not unlawful and their later effects may not constitute a Title VII violation. *See also Hazelwood*, 433 U.S. at 309 ("[S]tatistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII").

---

adverse impact and the bottom line, the Court should not accord them a legal status equivalent to the Guidelines.

Moreover, in other respects the Guidelines themselves are not consistent with Title VII and, accordingly, they should not be considered by the Court as having the "force and effect" of law. *See Albemarle*, 422 U.S. at 452 (Burger, C.J., concurring and dissenting in part). Thus, the Amici do not endorse the Guidelines except as indicated.

The basis for the second exception to the bottom line—for specific procedures which have been found not to be related in the same or similar circumstances—is equally questionable. The exception clearly bears no relationship to the overall results of selection process for if the overall process has no adverse impact, there is no basis for administrative or judicial inspection of a component of a selection procedure. Significantly, Justice Rehnquist in his concurring opinion in *Dothard* highlighted the inappropriateness of generalizing as to the validity of a component of a selection decision based on court or administrative decisions:

> While I also agree with the Court's conclusion in Part II of its opinion, holding that the District Court was "not in error" in holding the statutory height and weight requirements in this case to be invalidated by Title VII, *ante*, at 332, the issues with which that Part deals are bound to arise so frequently that I feel obliged to separately state the reasons for my agreement with its results. *I view affirmance of the District Court in this respect as essentially dictated by the peculiarly limited factual and legal justifications offered below by appellants on behalf of the statutory requirements.* For that reason, I do not believe—and do not read the Court's opinion as holding—that all or even many of the height and weight requirements imposed by States on applicants for a multiude of law enforcement agency jobs are pretermitted by today's decision.

Dothard, 433 U.S. at 377 (emphasis added) (concurring opinion Justice Rehnquist with whom the Chief Justice and Justice Blackmun join).[7]

---

[7] The justification for Justice Rehnquist's concern that the *Dothard* holding would be expanded to a general rule is reflected by the discussion of the enforcement agencies in Q & A 25 of the circumstances when components of a selection procedure should be evaluated. There, in illustrating the second exception to the bottom line, they state:

> Similarly, a minimum height requirement disproportionately disqualifies women and some national origin groups, and has

Thus, in view of the legal insufficiency of the two narrow exceptions found in section 4C to the bottom line standard and the fact that the Guidelines do not address the underlying question of law, the Uniform Guidelines in any event support the view that a prima facie case of disparate impact is established on the basis of selection rates and the total selection process. Accordingly, the results of the total selection process are the proper basis for establishing a prima facie case of disparate impact. As has been well-stated by the Third Circuit Court of Appeals:

> We hold, therefore, that no violation of Title VII can be grounded on the disparate impact theory without proof that the questioned policy or practice has had a disproportionate impact on the employer's workforce. This conclusion should be as obvious as it is tautological: there can be no disparate impact unless there is disparate impact.

EEOC v. Greyhound Lines, 635 F.2d 188, 192 (3d. Cir. 1980).

C. The Second Circuit's Decision Misapplies the Bottom Line Test by Inappropriately Making Distinctions Between Successive Hurdle and Cumulatively Scored Selection Processes and Fails to Recognize the Adverse Consequences of its Decision on Judicial Economy and Efficiency.

In its decision, the Second Circuit distinguished between selection processes that permit candidates to participate in all steps of the selection process (cumulatively scored processes) and those which preclude further participation of the candidate who does not meet a specified requirement or cutoff score (multiple or successive hurdle processes). With regard to the former, the appellate

---

been held not to be job related in a number of cases. For example, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Court held that height and weight requirements not shown to be job related were violative of Title VII. Thus an employer using a minimum height requirement should have evidence of its validity.

43 Fed. Reg. at 12000.

court concluded in agreement with numerous courts that a bottom line approach was appropriate.[8] It held that if "the overall results [of a cumulatively scored selection process] reveal no significant disparity of impact, scrutinizing individual questions or individual sub-tests would "conflict [] with the dictates of common sense." Pet. for Cert. 12a (citation omitted). With regard to multiple hurdle processes, however, the Second Circuit held, against the great weight of authority,[9] that if a component disproportionately acts as a barrier to blacks' further participation in the selection process it denies those blacks equal opportunity. Pet. for Cert 12a.

The Second Circuit's decision is based in part on its conclusion that to hold otherwise would mean that "Congress intended to protect faceless groups rather than individuals." Pet. for Cert. 12a. It reached this conclusion, in part, because it incorrectly understood how individual rights are protected in disparate impact cases. Justice Marshall (joined by Justice Brennan) in his concurring and dissenting opinion in *Furnco Construction Co. v. Waters*, 438 U.S. 567, 582 (1978), has clarified that "[a]n individual may allege that he has been sub-

---

[8] *See, e.g., Smith v. Tyron*, 520 F.2d 492, 497-98 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976); *Rule v. Ironworkers Local 396*, 568 F.2d 558, 565 n. 10 (8th Cir. 1977); *Williams v. City & Cty. of San Francisco*, 483 F. Supp. 335, 340 (N.D. Calif. 1979); and *Lee v. City of Richmond*, 456 F. Supp. 756, 771 (E.D. Va. 1978).

[9] *See, e.g., EEOC v. Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979); *Brown v. New Haven Civil Service Board*, 474 F. Supp. 1256, 1261-63 (D. Conn. 1979); and *Stewart v. Hannon*, 469 F. Supp. 1142 (N.D. Ill. 1979). *Cf. Kirkland v. New York State Department of Correctional Services*, 374 F. Supp. 1361, 1370 (S.D. N.Y. 1974), *aff'd in relevant part*, 520 F.2d 420, 425 (2d Cir. 1975) (showing that an overall examination procedure having disparate results cannot be rebutted by fragmenting the process and showing no disparate results in separate parts); and *Vulcan Society of New York City Fire Department v. Civil Service Commission*, 360 F. Supp. 1265, 1272 (S.D. N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973) (same). *Contra, League of United Latin American Citizens v. City of Santa Ana*, 410 F. Supp. 873, 894-95 (C.D. Calif. 1976).

jected to 'disparate treatment' because of his race or that he has been the victim of a facially neutral practice having a 'disparate impact' on his racial *group*." (Emphasis added.) Where facially neutral selection decisions have an adverse effect on a particular group, and cannot be justified by business necessity or otherwise validated, individual relief may be obtained. *Dothard*, 433 U.S. at 329. Here, the overall selection process had no adverse impact on blacks as a group and there is, therefore, no basis for relief for individual blacks.

The Second Circuit also concluded that a bottom line standard for successive hurdle selection processes was inappropriate because both the discriminatory component and affected individuals are readily identifiable. In contrast, it believed that cumulatively scored selection processes were inherently fairer and, accordingly, that the bottom line test should apply. Pet. for Cert. 12a.

Second Circuit Judge Newman sitting by designation in *Brown v. New Haven Civil Service Board*, 474 F. Supp. 1256 (D. Conn. 1979), has perceptively discussed the underlying fallacies and problems inherent in the Second Circuit's distinction between the two kinds of selection processes and the adverse consequences that judicial scrutiny of the selection components of selection processes would have on judicial economy and efficiency. In *New Haven Civil Service Board*, Judge Newman stated:

> The plaintiffs distinguish *Smith v. Troyan supra*, by pointing out that the written exam there was part of a cumulative application process. The written exam here, by contrast, combined with the physical exam, was a pass-fail hurdle that could prevent an applicant from entering the pool from which hiring decisions were made on the basis of interviews. *Cf. League of United Latin American Citizens v. City of Santa Ana, supra*, 410 F.Supp. at 894. But this distinction has no effect on the analysis of the problem presented. Even in a cumulatively scored application process, a score on any single component might

be so low as to preclude the accumulation of a total score meeting a minimum hiring requirement, *cf. United States v. City of Buffalo*, 457 F. Supp. 612, 622 (W.D.N.Y. 1978), or a total score at least equal to that of the lowest scoring applicant who was hired. The fact that test scores are cumulated in an application process would not itself prevent scrutiny of a component, if that type of investigation were legally required.

To examine each component of an entire application process, however, launches a court on a course that has no boundaries and no clear end. In *Smith v. Troyan*, *supra*, unsuccessful applicants to the East Cleveland police force challenged a "subtest" in the process of hiring. The court recognized that the same type of challenge could be made of any subtest segment of a subtest, and that at its extreme that theory of Title VII "would require the elimination of individual questions marked by poorer performance by a racial group . . . ." 520 F.2d at 498.

Presumably, even courts that have penetrated an application process to examine a component of it would draw the line at some point, to avoid scrutiny of every question of every test in a hiring procedure. Such particularized judicial review would create obvious problems of court management and administration. Moreover, a test used in evaluating applicants might be found valid despite the disproportionate effect on a minority group of a single question that was not job-related. *Cf. Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514 (8th Cir. 1977). Yet even if only one question has a disproportionate impact on a minority group, an individual who answers that question incorrectly and then fails by one point to accumulate the minimum required score for hiring can argue that he has been the victim of discrimination in the hiring process. The prospect of a court's examining subtests, sub-tests, and even individual questions within test

segments argues in favor of examining only the end result of an entire hiring process.[9]

[9] Once an overall hiring process has been found to discriminate, a court may examine the process to isolate components as the particular causes for that total unlawful effect. *See Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 354 F. Supp. 778, 794 (D. Conn.), *aff'd in part*, 482 F.2d 1333 (2d Cir. 1973).

474 F. Supp. at 1262 (footnote 8 omitted).

Not only does the Second Circuit's decision launch courts "on a course that has no boundaries and no clear end" (*id.*), but examination of the components of a selection process when the overall process does not evidence adverse impact creates a problem, widely acknowledged by statistical texts, of multiple comparisons.[10] That is, if there are many opportunities for a "rare event" to occur, *i.e.*, adverse impact in some component or subcomponent of a selection process, and courts search for adverse impact in a sufficiently large universe, we should not be surprised if courts find that one component of a selection process has adverse impact when the overall process has no such impact. Indeed, this Court has recognized that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *City of Los Angeles v. Manhart*, 435 U.S. 702, 710 n. 20 (1978) (emphasis in original).

In sum, the differences drawn by the Second Circuit between the two types of selection processes do not justify application of a bottom line standard for a cumulatively scored, but not for a successive hurdle selection process. Rather, the lower court's approach of judicial scrutiny of specific components of selection processes would have an

[10] *See, e.g.*, Miller, *Simultaneous Statistical Inference* (1977); Maxwell, *Analyzing Qualitative Data* (1977); and Feinberg, *The Analysis of Cross-Classified Categorical Data* (1977).

adverse effect on the effective use of judicial resources, and, more significantly, disrupts the practical proof scheme adopted by this Court in *Albemarle* and *Dothard* for prima facie cases of disparate impact.

D. The Second Circuit's Decision Conflicts With the Principles Enunciated By This Court in *Furnco*.

As discussed above, the Second Circuit concluded that a cumulatively scored selection process which permits all applicants to participate in the entire selection process was fairer than a successive hurdle process. Furthermore, the Court held that the results of the Petitioner's selection process could not relieve them of liability for the adverse impact of the component of a selection process. Pet. for Cert. 15a. The lower court's decision, however, is in direct conflict with this Court's decision in *Furnco*.

In *Furnco*, three qualified black bricklayers applied "at the gate" for employment. They were denied employment, not because they were unqualified, but because the job superintendent "did not accept applications at the jobsite, but instead hired only persons whom he knew to be experienced and competent in this type of work or persons recommended to him as similarly skilled." 438 U.S. at 570. The trial court found, however, that although only 5.7% of the bricklayers in the relevant labor market were minority group members, 13.3% of the man-days worked at Furnco were by black bricklayers. *Id.* at 571-72. Moreover, Furnco had a self-imposed affirmative action plan to insure that black bricklayers were hired in excess of their representation in the local union. *Id.* at 572. From these findings, the district court concluded that the plaintiffs had failed to establish a prima facie case of disparate impact or treatment. *Id.* The Seventh Circuit reversed. In finding that a prima facie case of disparate treatment had been established, the appellate court "reject[ed] Furnco's argument that discrimination had not been shown because a white appearing at the jobsite would have fared no better than

[plaintiffs]." *Id.* at 573-74. The Appeals Court held that Title VII precluded an employer from refusing to consider qualified blacks. *Id.* at 574 n. 5.

This Court reversed the Seventh Circuit.[11] It disagreed with the court of appeals' view that an employer must "consider the qualifications of the largest number of minority applicants." *Id.* at 576-77. Rather, the Court held that Title VII does not require businesses to adopt the " 'best' hiring procedures" or require an employer to "pursue [] the course which would both enable [it] to achieve [its] own business goal *and* allow [it] to consider the *most* employment applications." *Id.* at 577-78 (emphasis in original). Importantly, with respect to the Seventh Circuit's conclusion that "different practices would have enabled that the employer *at least consider*, and perhaps hire, *more minority employees*," this Court concluded that "courts may not impose such a remedy on an employer until at least a violation of Title VII has been proved." *Id.* at 578.

Significantly, moreover, the Court in *Furnco* also declined to remand the case to the appellate court for further consideration on whether Furnco's facially neutral selection process resulted in disparate impact. *Id.* at 575. In doing so, it upheld the finding of the trial court, affirmed by the Seventh Circuit, that Furnco's selection process which included an affirmative action component did not violate Title VII under a disparate impact theory.

The Second Circuit's decision, however, is in direct conflict with *Furnco*. The lower court has concluded that a selection process which permits all qualified candidates to participate in every component of a selection process is inherently fairer than one that does not. Its view im-

---

[11] Although the Court's decision in *Furnco* was decided on the basis of a disparate treatment theory, the principles enunciated by the court concerning the employer's obligation to consider qualified candidates and the effect of an affirmative action plan on liability are equally applicable here.

plies that selection processes that permit all applicants to proceed through all steps are somehow the "best" or "preferred" process for which a bottom line analysis is appropriate. On the other hand, it held that a selection process that contains a series of successive hurdles requires scrutiny of the component parts if one component has adverse impact. Thus, it has adopted two very different standards for establishing a prima facie case of disparate impact based on its perception of the "fairness" of the selection process. This Court expressly rejected such an approach in *Furnco* when it held that employers are not required to adopt a "best" hiring procedure that would permit it "to at least consider . . . the most minority employees." *Id.* at 578. Indeed, a unanimous Court expressly held in *Texas Department of Community Affairs v. Burdine*, 101 Sup. Ct. 1089, 1097 (1981) that Title VII "was not intended to 'diminish traditional management prerogatives' " and that an "employer has discretion to choose among equally qualified candidates." (Citation omitted.)

Accordingly, Title VII does not command that all applicants in a selection process be permitted to participate in all of its component parts. *Furnco*, 438 U.S. at 578. Indeed, as a practical matter, it is unrealistic to expect that all applicants for hire and candidates for promotion will proceed through all steps of a selection process. For example, if an employer has 100 applicants for 2 openings, the employer does not need an eligibility pool of 100 persons. Rather, through the components of its selection process it could legitimately seek to narrow the pool of qualified applicants to a manageable number from which to make its selection decision.[12] The effect of Second Circuit's decision, however, is to impermissively dis-

[12] *See Stewart v. Hannon*, 469 F. Supp. 1142, 1146 (N.D. Ill. 1979) ("It seems that the score was chosen so that, in a situation where there are more qualified candidates than openings, the Board would have the most qualified candidates (as determined by it) and the requisite size pool from which to choose").

courage the use of successive hurdle selection procedures and to prefer cumulatively scored procedures.

The Second Circuit's decision also conflicts with *Furnco* in stating that an affirmative action component of the selection process cannot insulate an employer from liability for the disparate results of another component of that selection process. By contrast, in adopting the reasoning of the district court in *Furnco*, 438 U.S. at 578, this Court indicated that the affirmative action efforts of the employer might ameliorate the disparate impact of a component of the selection process, absent evidence of a discriminatory motive with respect to the process utilized. Indeed, even with respect to the issue of motive, the Court held: "Proof that [its] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevent on the issue of intent when that issue is yet to be decided." *Id.* at 580. As shown below, an employer's voluntary policy to increase the minority selection rate furthers the policies of Title VII and is consistent with this Court's prior decisions.

E. Title VII and Decisions of This Court Permit Employers to Make Adjustments to Compensate for the Adverse Effects of Components of Selection Processes.

In the instant case, the employer offset the effects of the written component of the selection process by taking positive steps to assure that the overall selection rate would not have an adverse impact on minorities. The appellate court found these efforts irrelevant to the case because of its view that "an employer's adoption of affirmative action policies has never been held by the courts to relieve the employer of liability under Title VII to persons who were injured by the employer's previous discriminatory conduct" (Pet. for Cert. 15a), citing *Teamsters*, 431 U.S. at 341-42. As shown below, the Second Circuit's view is erroneous and undercuts the policies of Title VII which encourage *voluntary* adjustments to ameliorate the adverse effects which employment practices may have on minority employees. As this

Court has emphasized, the legal principles applicable to selection procedures must not be employed woodenly, but rather "must be viewed in the context of the [employer's] operation and the history of the testing program." *Albemarle*, 422 U.S. at 427.[13]

While affirmative action is not required by Title VII, once undertaken, it becomes relevant to an overall examination of the selection process. Thus, on the one hand, it is established, as noted above, that an employer is not *required* to establish the "best" hiring procedure that would permit it "to at least consider . . . the most minority employees." *Furnco* 438 U.S. at 578.[14] But on the other hand, in *Weber* and other cases this Court has stressed that the "primary" objective of Title VII is the removal of barriers to minorities "that have operated in the past to *favor* an identifiable group of *white* em-

---

[13] The situation in *Teamsters* referred by the Second Circuit has no counterpart in the instant case. In *Teamsters*, the employer's later affirmative action efforts were found insufficient to overcome the effects of earlier purposeful discrimination directed against specific minority individuals and groups. Here, there was no showing of such discrimination. Rather, the employer voluntarily undertook an opposite policy and attempted to ameliorate the effects of a neutral test in a way that would increase rather than exclude minority workforce participation. Furthermore, the Court's decisions in *Griggs* and *Albemarle* do not support the Second Circuit's refusal to credit the employer's affirmative action efforts. In both those cases, the Court viewed the selection procedures against a history of virtually total and intentional exclusion of minorities from their workforces. *See Griggs*, 401 U.S. at 426-27, 428-31, and *Albemarle*, 422 U.S. at 409-411, and 425-430.

[14] As stated by the Court in *Burdine*:

> Title VII, however, does not demand that an employer give preferential treatment to minorities or women. 42 U.S.C. § 2000e-2(j). *See Steelworkers v. Weber*, 443 U.S. 193, 205-206. (1979). The statute was not intended to "diminish traditional management prerogatives." *Id.* at 207. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. *Furnco Construction Co. v. Waters*, 438 U.S. at 577-578.

101 Sup. Ct. at 1097 (emphasis added).

ployees over other employees." *Griggs*, 401 U.S. 429-430 (emphasis added); *Albemarle*, 422 U.S. at 417 (1975); *and Weber*, 99 Sup. Ct. at 2727-28. It also is clear that voluntary compliance is the "preferred means" of eliminating employment discrimination (*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)), and that employers are encouraged to "self-examine and to self-evaluate their employment practices." *Teamsters*, 431 U.S. at 364; and *Weber*, 99 Sup. Ct. at 2728.

In keeping with Title VII's policy of self-examination, the federal enforcement agencies have adopted policies that encourage both voluntary compliance and the bottom line standard for selection procedures. For example, in the 1978 Uniform Guidelines, the enforcement agencies concluded that voluntary action to eliminate the adverse impact of a selection procedure is permissible under Title VII. Importantly, in terms of determining adverse impact of selection procedures those guidelines do not distinguish between cumulatively scored and successive hurdle selection processes. See Section 3A, 29 C.F.R. § 1607.3A. More significantly, however, Section 6 of the Uniform Guidelines provides that where a selection procedure has adverse impact, the employer may (1) modify a formal, scored procedure such as a test to eliminate the adverse impact or (2) eliminate the adverse impact from unscored procedures, or (3) choose alternative selection procedures as part of an affirmative action program to eliminate the adverse impact. 29 C.F.R. § 1607.6. Here, the Petitioners lowered the cutoff score of the test to increase the participation of blacks in the later steps of the process. When it became evident that that action alone would be insufficient to eliminate adverse impact from the total selection process if the Petitioners selected supervisors in proportion to the representation rate of those candidates whose test scores exceeded the cutoff score, they took further action in accordance with Section 6 to eliminate the adverse impact.[15] Thus, the four federal

[15] As discussed above, "an employer has discretion to choose among equally qualified candidates". *Burdine*, 101 Sup. Ct. at 1097.

enforcement agencies have encouraged and authorized under Title VII the very action which the Petitioners herein took.

The EEOC's Affirmative Action Guidelines, 29 C.F.R. §§ 1608 *et seq.*, also encourage voluntary action. Section 1608.4 of the Guidelines provides in relevant part that if self analysis shows that the employer's employment practices have or tend to have adverse effect, the employer may take reasonable action designed to correct the problem. Significantly, it is not necessary under the Guidelines that the self analysis establish a violation of Title VII.[16]

Employers, like the Petitioners, who analyze their workforce or applicant flow statistics and determine that there may be potential Title VII liability, may conclude that voluntary efforts are warranted so that their workforces more closely mirror the racial or sexual composition of the qualified labor force in the relevant labor market. Even if it is not certain that an employer has discriminated, a self analysis of the surrounding circumstances may lead it to conclude that corrective action should be undertaken voluntarily. *See, e.g., United Steelworkers v. Weber, supra.* Relevant considerations could include a desire to remedy the effects of past discrimina-

---

[16] In addition to the voluntary equal employment mandate of Title VII, both public and private sector employers are also subject to various mandatory affirmative action requirements. Federal contractors at some 325,000 establishments are subject to the affirmative action obligations of Executive Order 11246, 30 Fed. Reg. 12319 (1965), *as amended by* 32 Fed. Reg. 14302 (1967) and 43 Fed. Reg. 46501 (1978). Unlike Title VII, the statistical imbalances that trigger these affirmative action requirements need not be connected to any showing of past or present discrimination. *See Hearings on S. 2115, etc., Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess.* 77, 88 (1971); Nash, "Affirmative Action Under Executive Order 11246," 46 N.Y.U. L. Rev. 225, 229-230 (1971). Likewise public employers, like the petitioners herein, are subject to various state affirmative action statutes. See, *e.g.*, Conn. Stat. § 46a-68.

tion, the possibility of time consuming and costly processing of discrimination complaints, the uncertainty of the outcome of litigation, and a desire to avoid wasteful and expensive litigation. As the *Weber* decision indicates, the public policy of encouraging voluntary compliance could hardly be achieved if such actions were permitted only when discrimination could be established to a certainty.

Here, the Petitioners self analysis showed that even after lowering the cutoff score—itself an affirmative step—the lower score would also result in adverse impact against blacks for the total selection process if the employer made its selections of the qualified persons in the eligibility pool in proportion to their representation therein. Thus, the Petitioners took positive steps to assure adequate representation of black supervisors in its workforce. Such action on its part was not impermissible under Title VII because "the employer has discretion to choose among equally qualified candidates," *Burdine*, 101 Sup. Ct. at 1097, as identified by the application of the components of the selection process.

In sum, the Petitioners' voluntary action was reasonable under the circumstances. It was "a temporary measure, [and] it is not intended to maintain racial balance, but simply to eliminate manifest racial imbalance." *Weber*, 99 Sup. Ct. at 2730. Moreover, it did not involve a quota or a specified number of selections from a particular a class. *See Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The decision of the Second Circuit, however, places employers in the ironic position of being liable under Title VII even if they take voluntary action to increase the selection rate to favor the complaining party's class. Under the Second Circuit's decision, employers who have attempted successfully to evaluate and modify their employment practices still would find these attempts insufficient to prevent a finding of adverse impact caused by a component of a selection process. Such a result is inconsistent with the purposes of Title VII and the decisions of this Court.

CONCLUSION

The decision of the Second Circuit undercuts the practical proof scheme that this Court has adopted for prima facie cases of disparate impact as well as the equal employment mandate of Title VII. Accordingly, its decision should be overturned by this Court.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
EDWARD E. POTTER
MCGUINESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

December 3, 1981